

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
BROOKFIELD DEVELOPMENT, INC.	)	
and	)	FCC File No.0001030441
COLORADO CALLCOM	)	
	)	
For consent to assignment of license for	)	
Private Land Mobile Radio Station WNXS842,	)	
Denver, Colorado	)	

**ORDER**

**Adopted: May 21, 2003**

**Released: May 23, 2003**

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. On November 8, 2002, ACS Investments, Inc. (ACS) filed a Petition for Reconsideration (Petition) of the Wireless Telecommunications Bureau's (Bureau's) grant of consent to the above-captioned application to assign the license for private land mobile radio (PLMR) Station WNXS842, Denver, Colorado, from Brookfield Development, Inc. (Brookfield) to Colorado Callcom (Callcom).<sup>1</sup> For the reasons stated below, we deny the Petition.

**II. BACKGROUND**

2. On January 16, 2002, the Commission granted Brookfield's application for renewal of the license for Station WNXS842, with a license term that runs through December 5, 2011.<sup>2</sup> No petitions for reconsideration were filed and this grant became a final action on February 16, 2002.<sup>3</sup>

3. On September 25, 2002, the Bureau gave public notice of the acceptance for filing of the above-captioned application for consent to assign the license for Station WNXS842 from Brookfield to Callcom.<sup>4</sup> On October 9, 2002, the Bureau released a public notice announcing that it granted the above-captioned application on October 1, 2002.<sup>5</sup> On October 10, 2002, Callcom notified the Commission that

<sup>1</sup> ACS Petition for Reconsideration (filed Nov. 8, 2002) (Petition).

<sup>2</sup> FCC File No. 0000667622 (filed Nov. 16, 2001). The license was renewed through December 5, 2011.

<sup>3</sup> See 47 U.S.C. § 405. See also 47 C.F.R. § 1.106(f) (petition for reconsideration be filed within thirty days of the date of public notice of the Commission action).

<sup>4</sup> See Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Accepted for Filing, *Public Notice*, Report No. 1295 (Sept. 25, 2002) (*Acceptance PN*).

<sup>5</sup> Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Action, *Public Notice*, Report No. 1309 (Oct. 9, 2002) (*Grant Public Notice*). ACS filed a Motion for Immediate Stay and Request to Set Aside Grant (filed Oct. 9, 2002), which we denied. See Letter to Robert J. Keller, Esq., from D'wana R. Terry, Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau (Oct. 23, 2002).

the assignment from Brookfield to Callcom was consummated on October 1, 2002.<sup>6</sup> On November 8, 2002, ACS filed the instant Petition, which Callcom and Brookfield subsequently opposed.<sup>7</sup>

### III. DISCUSSION

4. *Invalid grant under Section 309.* In the Petition, ACS argues that the Bureau's grant of the above-captioned application—only six days after the *Acceptance PN*—was invalid for failure to comply with the 30-day notice and protest requirements of Section 309 of the Communications Act of 1934, as amended (the Act).<sup>8</sup> In this connection, ACS acknowledges that these statutory requirements apply to common carrier and broadcast applications and that the license for Station WNXS842 is PLMR.<sup>9</sup> However, ACS avers that the notice and protest requirements governed the above-captioned application nonetheless because, according to ACS, Callcom was using the facility “on a commercial basis” even before the assignment.<sup>10</sup> Specifically, ACS alleges that the City of Thorton operated approximately 12 remote stations on Brookfield's channel to monitor and control water irrigation, and that Callcom provided this service to Thorton.<sup>11</sup> ACS also notes that Callcom intends to modify the license to commercial operation,<sup>12</sup> which Callcom acknowledges.<sup>13</sup> For these reasons, ACS concludes that the Bureau's failure to process the above-captioned application under the 30-day notice and protest requirements for common carrier applications defies the regulatory parity that Congress intended by codifying the distinction between private (PMRS) and commercial (CMRS) mobile radio services in Section 332 of the Act.<sup>14</sup>

5. Brookfield denies that its station was used on a commercial basis<sup>15</sup> and Callcom states that its pending application to modify the license for Station WNXS842 to commercial status has no bearing on the Bureau's action on the captioned application to assign a PLMR license.<sup>16</sup> In this connection, Callcom avers that there is no precedent for the Commission to impose Section 309's requirements for common carrier applications in instances where a third party has *alleged* that a licensee

<sup>6</sup> Form 603 Sched. D (Notification of Consummation of Assignment), FCC File No. 0001055152 (filed Oct. 10, 2002).

<sup>7</sup> See Opposition of Colorado Callcom (filed Nov. 21, 2002) (Callcom Opposition) and Opposition of Brookfield Development (filed Dec. 10, 2002) (Brookfield Opposition).

<sup>8</sup> 47 U.S.C. § 309, which provides that any party in interest may oppose grant of a license application in the broadcasting and common carrier services, as well as in certain other specified services not relevant here, if that grant would be inconsistent with the public interest, convenience and necessity standard set forth in Section 309(a) of that Act. See 47 U.S.C. § 309(a), (b), (d). Since this statutory framework for opposing applications does not cover the service at issue here - a private land mobile radio service - the filing of a petition to deny a private radio license application is not a matter of right, but rather a matter within the Commission's discretion. See S&L Teen Hospital Shuttle, *Memorandum Opinion and Order*, 16 FCC Rcd 8153, 8155 n.14 (2001) (*S&L Teen Hospital Shuttle*).

<sup>9</sup> Petition at 3.

<sup>10</sup> *Id.* at 3-4.

<sup>11</sup> *Id.* at 7.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> Callcom Opposition at 3 citing FCC File No. 0001066599 (filed Oct. 23, 2003).

<sup>14</sup> Petition at 4 citing legislative history of 1993 amendments to 47 U.S.C. §§ 3(n) and 332 of the Communications Act, and the Commission's holdings in GN Docket No. 92-252 that similar mobile radio services must be accorded similar regulatory treatment (cites omitted).

<sup>15</sup> Brookfield Opposition at 2.

<sup>16</sup> Callcom Opposition at 2-3.

was acting like a common carrier.<sup>17</sup> We agree. Moreover, we note that (1) the Petition does not allege that the station was used to provide a mobile service that made interconnected service available, and (2) the license for PLMR Station WNXS842 does not authorize interconnection. Under Section 332(c) of the Act, a mobile service is a private mobile service if it is not interconnected, and a private mobile service shall not “be treated as a common carrier for any purpose under this Act.”<sup>18</sup> Accordingly, the Petition’s reliance on Section 309’s requirements for common carrier applications is unavailing. As discussed in paragraph 7, *infra*, we also note that ACS has not established its factual claims related to this allegation.<sup>19</sup>

6. *Improper renewal; automatic cancellation for non-operation.* Next, ACS alleges that the license cancelled automatically sometime between the Spring of 2000 and July or August of 2001 (“2000-2001”) because Brookfield allegedly discontinued operating Station WNXS842.<sup>20</sup> Based on this allegation, ACS avers that the Bureau erred by: (1) granting Brookfield’s renewal application on January 16, 2002, and (2) granting the above-captioned assignment application on October 1, 2002. Put simply, ACS reasons that a cancelled license cannot be renewed or assigned.<sup>21</sup> Specifically, ACS states that Michael Tony Westall, its principal, and other persons associated with ACS are “intimately familiar” with operations on the subject channel and did not notice any co-channel operations from Brookfield during 2000-2001.<sup>22</sup> ACS also claims that conversations between Mr. Westall and Patrick M. Hilleary, a Brookfield employee and property manager of Republic Plaza,<sup>23</sup> demonstrate that Brookfield permanently discontinued operating Station WNXS842.<sup>24</sup> Brookfield denies that it permanently discontinued operating the station and counters ACS’s generally unsubstantiated allegations (including allegations about conversations between Messrs. Westall and Hilleary) with Mr. Hilleary’s detailed declaration.<sup>25</sup>

7. As an initial matter, ACS’s assertion that the renewal of Brookfield’s license was improper is effectively a late-filed petition for reconsideration of January 16, 2002 grant. In this connection, we note that these allegations relate to 2000-2001, *i.e.*, Brookfield’s previous license term.

<sup>17</sup> Callcom Opposition at 3-4 (*emphasis added*). Callcom notes that adopting ACS’s approach would be untenable because the Commission would have to evaluate every application for a non-common carrier or non-broadcast facility to determine if the applicant were *acting* like a common carrier or broadcaster. *Id.*

<sup>18</sup> See 47 U.S.C. § 332(c)(2).

<sup>19</sup> Moreover, had ACS established that Brookfield allowed its PLMR station to carry traffic outside the parameters of its authorization, it would appear that enforcement action would be a more appropriate remedy under the circumstances presented than denial of the above-captioned application. See, e.g., Callcom Opposition at 5-6 *quoting* 47 U.S.C. § 310(d) (No . . . license . . . shall be . . . assigned . . . except . . . upon a finding by the Commission that the public interest . . . will be served thereby). Callcom contends that the Commission “has never found that any of the actions ACS alleges occurred warrant a determination that an applicant is not fit to be a Commission licensee.” Callcom Opposition at 6.

<sup>20</sup> Petition at 4. Under 47 C.F.R. § 90.157, a license cancels automatically upon permanent discontinuance of operations; also, a station not operated for more than one year is generally considered to have been discontinued permanently. Under 47 C.F.R. § 1.955(a)(3), authorizations automatically terminate, without specific Commission action, if service is permanently discontinued.

<sup>21</sup> Petition at 5-6.

<sup>22</sup> *Id.* ACS states that Mr. Tony Westall, the principal of ACS, and other persons who work closely with him in his business have their personal units homed on this channel and monitor it constantly even when they are not actually communicating. *Id.*

<sup>23</sup> Republic Plaza, according to ACS, is the building that houses the transmitter site for Station WNXS842. Petition at 4.

<sup>24</sup> *Id.* at 4-6.

<sup>25</sup> Brookfield Opposition at 3-4 and Declaration of Patrick M. Hilleary.

Taken with ACS's generally unsubstantiated factual allegations, including the claim of conversations with Mr. Hilleary that are specifically refuted by Mr. Hilleary's declaration, we find ACS's allegations unpersuasive.<sup>26</sup> We also note that the Commission has consistently held that isolated monitoring alone is insufficient to support a request for cancellation of a station license.<sup>27</sup> The record does not contain any detailed records of the alleged monitoring such as logs showing the exact duration of the monitoring, nor has ACS submitted any monitoring studies to support its claim of non-operation.<sup>28</sup> We further note that the record confirms that the station was operational during the one-year period before the assignment on October 1, 2002. Specifically, the record reflects that: (1) ACS complained to the Commission about the operations of Station WNXS842 in July 2002, and (2) the Commission's Enforcement Bureau inspected the station on October 4, 2002, and confirmed that it was constructed and operating.

8. *Premature transfer of control.* ACS also claims in the Petition that (1) Mr. Hilleary advised Mr. Westall in July 2002 that Brookfield has "sold the channel to Callcom" and (2) Callcom has been using the channel since that time. Based on these claims, ACS contends that Brookfield and Callcom engaged in a premature transfer of control of Station WNXS842 in violation of Section 310(d) of the Act.<sup>29</sup> Brookfield and Callcom deny this contention and Mr. Hilleary's declaration explains that "[i]n July 2002 Brookfield and Callcom executed an Asset Purchase Agreement that included an election of Callcom as manager of the system until such time as the station assignment was complete."<sup>30</sup> Based on the record before us and as discussed in paragraph 7, we find that ACS has not established the factual claims related to this allegation.

9. We recognize that there are conflicting allegations in the record and note that the Commission has broad discretion as to how much weight to accord disputed facts based on the existing record.<sup>31</sup> ACS has offered unsubstantiated claims or hearsay in support of its "CMRS," "permanently discontinued," and "premature transfer" allegations. While hearsay that is relevant and material is admissible in administrative proceedings,<sup>32</sup> the weight to be accorded it depends on its truthfulness, reasonableness, and credibility.<sup>33</sup> A prime indicium of probity is whether the declarants are disinterested witnesses.<sup>34</sup> Thus, relevant to the weight given to submitted evidence is whether the declarants are

<sup>26</sup> Based on its theory that Brookfield's license automatically cancelled, ACS further alleges that "all operations ostensibly undertaken pursuant to [the cancelled license are] . . . unlicensed transmissions in violation of . . . 47 U.S.C. § 301." Petition at 6. Because the license did not cancel, the unlicensed operation claim fails.

<sup>27</sup> See, e.g., University of Southern California, *Memorandum Opinion and Order*, 16 FCC Rcd 2978, 2982 ¶ 11 (2001) (sporadic monitoring of a channel does not make a *prima facie* case that a licensee has permanently discontinued operations); *S&L Teen Hospital Shuttle*, 16 FCC Rcd at 8157 ¶ 8 (allegation of inoperation deemed unsubstantiated without monitoring studies); Quatron Communications, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 4749, 4753 ¶ 13 (2000) (evidence of sporadic monitoring by itself does not conclusively demonstrate that a station licensee has discontinued operations as defined in Section 90.157 of the Commission's Rules) (Quatron); Ballentine, *Memorandum Opinion and Order*, 14 FCC Rcd 18956, 18957-8 ¶ 5 (1999) (an allegation of sporadic monitoring is insufficient to demonstrate non-operation); Cellular Design Corporation, *Memorandum Opinion and Order*, 14 FCC Rcd 13059, 13064 ¶ 12 (1999) (an allegation of sporadic monitoring, by itself, is insufficient to conclusively demonstrate that a station has permanently discontinued operation).

<sup>28</sup> See Quatron, 15 FCC Rcd at 4753-54 ¶ 13.

<sup>29</sup> Petition at 8 quoting 47 U.S.C. § 310(d).

<sup>30</sup> Hilleary Declaration at 7.

<sup>31</sup> Quatron, 15 FCC Rcd at 4754 ¶ 15 (citing *Gencom, Inc., v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987)).

<sup>32</sup> Application of Wine Country Radio, *Memorandum Opinion and Order*, 11 FCC Rcd 2333, 2334 ¶ 6 (1996) (*Wine Country MO&O*) (citing *Johnson v. United States*, 628 F.2d 187, 190 (D.C. Cir. 1980) (*Johnson*)).

<sup>33</sup> *Wine Country MO&O*, 11 FCC Rcd at 2334 (citing *Johnson*, 628 F.2d at 190-91).

<sup>34</sup> *Wine Country MO&O*, 11 FCC Rcd at 2334 (citing *Johnson*, 628 F.2d at 191).

disinterested witnesses.<sup>35</sup> Taking this into consideration, Mr. Westall, as ACS's principal, fails to qualify as a disinterested witness. Given that the burden of proof rests upon ACS as the proponent of Commission action,<sup>36</sup> we note that ACS has not established these claims. Moreover, as noted, most of these allegations are directly refuted by Mr. Hilleary's declaration.<sup>37</sup>

#### IV. CONCLUSION

10. In view of the foregoing, we find that the Petition provides no basis for reversing the grant of consent to the captioned application to assign the license for PLMR Station WNXS842 from Brookfield to Callcom. Accordingly, we deny the Petition.

#### IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed on November 8, 2002, by ACS Investments, Inc., IS DENIED.

12. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry  
Chief, Public Safety and Private Wireless Division  
Wireless Telecommunications Commission

---

<sup>35</sup> Quatron, 15 FCC Red at 4754.

<sup>36</sup> Samuel Moses PR, *Order on Reconsideration*, DA 03-479 at ¶ 3 (WTB PSPWD Feb. 21, 2003) (citing *Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988)).

<sup>37</sup> By comparison, ACS supports the factual allegations in the Petition with Mr. Westall's comparatively general declaration under penalty of perjury that he is "personally familiar with the factual matters addressed in the petition . . . [and] [a]ll of the factual allegations set forth in the petition . . . except matters . . . specifically stated to be made on information and belief, are true and correct to the best of my knowledge . . . ." Westall Declaration at 1.